UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	)
	)
PLAINTIFF,	) CASE NO. 2:17-cr-138 (1)
	)
vs.	)
	)
BERND D. APPLEBY,	)
	)
DEFENDANT.	)
	)

TRANSCRIPT OF SENTENCING PROCEEDINGS
BEFORE THE HONORABLE JAMES L. GRAHAM, SENIOR JUDGE
THURSDAY, APRIL 5, 2018; 9:35 A.M.
COLUMBUS, OHIO

FOR THE PLAINTIFF:
Benjamin C. Glassman
United States Attorney
By: JESSICA H. KIM
Assistant United States Attorney
303 Marconi Boulevard, Suite 200
Columbus, Ohio 43215

FOR THE DEFENDANT:
McNeese Wallace & Nurick LLC
By: KARL H. SCHNEIDER, Esq.
21 East State Street, Suite 1700
Columbus, Ohio 43215

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Proceedings recorded by mechanical stenography, transcript produced by computer.

ALLISON KIMMEL, RDR, CRR, CRC
FEDERAL OFFICIAL COURT REPORTER
85 MARCONI BOULEVARD, ROOM 121
COLUMBUS, OHIO 43215
614-719-3225

Thursday Morning Session

April 5, 2018

- - -

(The following proceedings were had in open court.)

THE COURT: Good morning, ladies and gentlemen. The Court will recognize Assistant United States Attorney Jessica Kim. Good morning, Ms. Kim.

MS. KIM: Good morning, Your Honor.

THE COURT: Does the Government have a case to present to the Court this morning?

MS. KIM: Yes, Your Honor.

THE COURT: Very well. The clerk may call the case.

COURTROOM DEPUTY: 2:17-CR-138-1, the United States of America versus Bernd D. Appleby. The defendant will come forward.

THE COURT: Are you Bernd Appleby?

THE DEFENDANT: Yes, I am.

THE COURT: And you are represented by Attorney Karl Herbert Schneider; is that correct?

THE DEFENDANT: Yes, indeed.

THE COURT: Good morning, Mr. Schneider.

MR. SCHNEIDER: Good morning, Your Honor.

THE COURT: Ms. Kim, what is the status of this case?

MS. KIM: Your Honor, on August 16th, 2017, the defendant, Bernd Appleby, entered a plea of guilty to a

one-count Bill of Information charging him with conspiracy to commit wire fraud, in violation of 18 United States Code Section 1349.

The defendant is before the Court today for sentencing.

THE COURT: Very well. This case presents the Court with a Rule 11(c)(1)(C) plea agreement which contains not just a guilty plea but also certain stipulations regarding the maximum applicable penalties in this case, and so the first -- the first order of procedure this morning is to determine whether or not the Court will accept such a plea agreement in this case.

Now, under Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure, the Court has broad discretion whether to accept or reject a Rule 11(c)(1)(C) plea agreement.

The Court must consider the facts and circumstances of the case and determine whether the stipulated sentence would serve the ends of justice and whether it is too lenient or would otherwise not be adequate to serve the public interest.

The Court must evaluate the sentence to ensure that it is sufficient, but not greater than necessary, to comply with the statutory sentencing factors set forth in Section 3553(a).

If the agreed sentence is not within the applicable guideline range, the Court must determine if any departure from that range is supported by justifiable reasons.

Now, the Court has reviewed the submissions of the

parties regarding the Rule 11(c) plea agreement, and the first issue the Court needs to address is the applicable guideline sentencing range in order to decide whether the case falls -- whether the agreed sentence falls within the guidelines, and in this case there is an exception to the calculations made by the probation officer regarding the guidelines.

In particular, there is -- there is an objection to the probation officer's conclusion that there should be a sentence enhancement in this case in the determination of the guidelines based on the existence of a conspiracy which was -- consisted of five or more individuals or was otherwise extensive.

So I would like to hear from counsel on that issue initially, and I would like to hear from the objecting party. That would be Mr. Schneider on behalf of defendant.

Mr. Schneider.

MR. SCHNEIDER: Your Honor, thank you very much.

We did -- and I also want to say there were some objections that we had also made to certain factual statements made in the final --

THE COURT: Yes, I'm aware of that.

MR. SCHNEIDER: -- PSR. We're withdrawing those. We're not going to make an issue and will stand on those.

THE COURT: Very well. The Court appreciates that.

MR. SCHNEIDER: So the remaining -- the remaining objection, which is the substantive enhancement objection, does

deal with the aggravating role enhancement that the probation department has recommended, and my understanding is that the Government supports.

My understanding is that it is premised on the -- on the prong that there's five or more participants.

It is our belief, and I think Ms. Kim may --

THE COURT: Well, we've got four for sure.

MR. SCHNEIDER: We have four. We have four.

THE COURT: All right. Tell me about the fifth. This issue there, is this Mr. Chowdry?

MR. SCHNEIDER: No. It's Atul Dhall -- D-a -- D-a -- D-l -- D-h-a-l-l -- is the participant --

THE COURT: Yes.

MR. SCHNEIDER: -- that would be added into the mix as the fifth participant according to the Government's theory and the probation officer's report.

Our reading -- our understanding of the facts, for one, and our reading of the *Anthony* case and also the *Lewis* case, which are both Sixth Circuit cases that dealt with this issue, are that a generalized suspicion on the part of an individual isn't enough to make the case of participancy. You really have to be a co-conspirator in the truest sense. You would have to be guilty and culpable of a crime.

THE COURT: And you would have to have knowledge.

MR. SCHNEIDER: And you would have to have knowledge,

which is one of the elements of the crime. So our view, as it stands right now, is that Mr. Dhall came to the company very late in the game. He came to the company in 2010. He was housed on the West Coast, although he had a direct report in Jason Joyce, which is one of the defendants with whom you have dealt with back in December.

He didn't have much contact with Joyce on a day-to-day basis. He was not part of the Oracle litigation, Mr. Dhall, that is. He was not a named party in the Oracle litigation. He wasn't a participant in the resolution of that litigation, and we take the view that -- that Mr. Dhall was a conduit for information.

He was privy to certain emails. He might have had some generalized suspicion, but not enough to make him a participant for purposes of the enhancement, and I think that the fact that the Government chose not to prosecute him -- and I understand the Government doesn't have to prosecute every co-conspirator -- my view is that the Government didn't view Mr. Dhall in terms of a co-conspirator.

They may tell you otherwise, but in the end of the day, there was no case brought against him, and my suspicion on that is probably because he was in their mind a conduit.

He wasn't certainly enough of a participant that they felt like there was a prosecutable offense, and so that's -- if you are asking me generally, I think Ms. Kim may put on some --

some evidence in that regard, but I think based on the holdings of -- the Sixth Circuit holdings in *Anthony*, which dealt with a conspiracy to remove safety devices, of all things, from cigarette lighters, and then the *Lewis* case, where a woman was getting gift certificates at a casino and then asking people to go up and cash them for her, in both of those cases, Your Honor, the Court said that's -- that you are a participant -- you are not enough of a participant to be liable for a criminal offense, and we're going to hold participancy by the standard by which you would be prosecuted and you would have to have knowledge.

In the *Anthony* case, the lawyer sent a letter to the Government, and the case that the Government brought dealing with the safety devices conspiracy were false statements, and they said the lawyer was simply passing along on his letterhead communications that he had had with the others and that that just doesn't rise to that particular threshold.

So you asked me the basis of our objection. I think at this point in time, that is the basis of our objection. That Atul Dhall much more closely resembles the lawyer in *Anthony* and much more closely resembles one or more patrons of a Mississippi casino that was cashing checks.

He was not really in the management loop, didn't have any -- I think that bears out. He had not a whole lot of contact with Jason Joyce, and he was located in California, and

his direct report, Jason Joyce, was in the Dublin office, where Mr. Olding and Mr. Quinn were, albeit Mr. Appleby was in the West Coast office.

THE COURT: All right. Mr. Schneider, it's my impression that the -- that the key to the issue is whether or not Mr. Dhall had actual knowledge of the fraud.

There's no dispute that he performed some functions and assisted in carrying out the fraudulent scheme, is there?

MR. SCHNEIDER: That's correct.

THE COURT: So the question is did he know it? Did he know it was fraudulent?

MR. SCHNEIDER: Right.

THE COURT: All right. All right. Ms. Kim.

MS. KIM: Your Honor, I believe there are three major issues with respect to the enhancement: First, was the defendant an organizer and leader? I thought he was contesting the fact that we had asserted he received a larger share of the financial fruits of the crime.

THE COURT: No. I think this boils down to one issue: Did Mr. Dhall know of the fraud?

MS. KIM: And our contention is yes, and we're prepared to produce evidence on that.

THE COURT: All right. Fine. Counsel, you may be seated at counsel table, and the Government may call its first witness.

MS. KIM: Thank you, Your Honor. The United States calls Special Agent David Fine.

THE COURT: Sir, please step forward and the clerk will swear you in.

(Witness sworn.)

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DAVID FINE

Called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. KIM:

Q Good morning.

A Good morning.

Q Can you please state your name for the record and spell your last name for the court reporter?

A My name is David Graham Fine. My last name is spelled F-i-n-e.

Q Mr. Fine, where do you work?

A I'm an FBI supervisory special agent.

Q How long have you been in that position?

A I've been a supervisory special agent since July of last year.

Q What about a non-supervisory special agent?

A Since 2011.

Q Where did you serve in that role?

A I served in that role here in Columbus, Ohio.

Q And how long did you serve in that role?

A From September 2011 through July 2017.

Q What kind of training have you had for that position?

A As an FBI agent, for starters, we have approximately 21 weeks of training at FBI Academy when we become an FBI employee.

That training is extensive. It covers all areas of law enforcement, from investigating cases generally to financial cases specifically, and cyber investigations as well.

After FBI Academy, I have had several secondary trainings, specifically, detailed trainings on white collar crimes, on cyber crimes; and I have received extensive outside vendor training in cyber matters.

Q What did you do before you were -- became a special agent for the FBI?

A Before becoming an FBI agent, I was an attorney for approximately seven and a half years, specializing in complex financial transactions.

Q Have you been involved in the investigation of the defendant, Bernd Appleby?

A I have.

Q Explain to us how that investigation came about.

A In July 2014 I received a complaint forwarded to the FBI through the United States Attorney's Office, and that complaint

came from counsel to Oracle, the victim in this case.

Q What did the complaint entail?

A The complaint alleged a widespread fraud of their intellectual property that they had uncovered as part of a civil litigation that they had filed in 2013.

Q What did your investigation, generally speaking, reveal?

THE COURT: Ms. Kim.

MS. KIM: Yes.

THE COURT: I don't need any of this.

MS. KIM: Do you want me to go straight to the knowledge?

THE COURT: I want to know about Mr. Dhall, and I want to know what he knew.

Q Okay. What was Mr. Dhall's position at TERiX?

A Mr. Dhall, as of today's date, is an executive vice president in charge of service delivery.

Q Was he a member of the executive team at TERiX?

A Yes. The way that TERiX carried out its day-to-day functions was there was a four-person executive management team headed by the defendant, and it included Mr. Dhall and two other individuals.

Q Do you know of facts that would lead you to believe that Mr. Dhall had knowledge of the criminal conspiracy in this case?

A I do.

Q What facts are those?

A As a member of the executive management team, Mr. Dhall's job function was to be a conduit between Jason Joyce and the executive management team.

Mr. Joyce was executing on a day-to-day basis most of the fraud that was orchestrated by Mr. Appleby, so Mr. Dhall would take Mr. Joyce's information, present it to the management team, and then any recommendations or deviations or evolutions of the fraud were then conveyed through Mr. Dhall to Mr. Joyce.

In addition, what Mr. Dhall told us was that Mr. Dhall was fully aware of the use of an entity called Summit Technology.

It's noteworthy because Mr. Appleby and TERiX's fraud involved several entities. One of them, Summit Technology, isn't even a real entity. It's a completely fictitious entity. It had a website that they created and a domain and email addresses, but it was not a legal entity.

And Mr. Dhall not only knew of that, he directed the use of that, and he directed the use of other credentials that Mr. Joyce would use in furtherance of the fraud.

Q Was he also familiar with a policy called Snoe Wight?

A Yes. Without going into too much detail, in 2013, all of the policies and procedures that constituted the core of the fraud were memorialized in a handbook that became referred to

as Snoe Wight.

It began in 2003, and this was in 2013 that that was done. Mr. Joyce, his charge was to author that document. He authored that document, by his testimony, with Mr. Dhall and another colleague, Sean Goodman.

Q Was he also familiar with a policy called ClearVision?

A Yes. As part of the fraud, it was essential to Mr. Appleby that the fraud go undetected, and the fraud was undetected for almost a decade.

As part of that, there was a process called ClearVision, and ClearVision was the interaction between TERiX and its customers.

If a customer had a concern about the legality of the process, Mr. Quinn, one of the co-defendants, would give a ClearVision presentation, and he would do so under a nondisclosure agreement to hide the fraud.

Mr. Dhall was intimately aware of ClearVision and its objectives.

Q Did he know about other certain covert steps undertaken by TERiX to hide its involvement from Oracle?

A Yes. As part of its widespread processes to -- to hide from the victim, various credentials were created, aliases were used, prepaid phones were used, fake addresses were used. Mr. Dhall was aware of all of that.

In addition, at one point the victim became aware of

TERiX's activity by tracking IP addresses that came back to TERiX that were used to steal intellectual property.

As part of that, Mr. Dhall directed Mr. Joyce to use a DSL line, a standard AT&T internet line that anyone could purchase, that was not as easily identifiable as associated with TERiX, and Mr. Joyce told us that Mr. Dhall is the one who directed him to use that facility to engage in the fraud.

Q Did he also know about TERiX's position on one-to-many?

A Yes.

MR. SCHNEIDER: Objection. Only as to what --

THE COURT: I'm sorry. What was the question again?

MS. KIM: I asked did Mr. Dhall know about TERiX's position on one-to-many.

THE COURT: All right. Mr. Schneider, you have an objection?

MR. SCHNEIDER: Well, she's asking what Mr. Dhall knew. I mean, he might be able -- what he understood --

THE COURT: What's the basis of your objection? Is it leading or what is your ground?

MR. SCHNEIDER: Speculative. Speculation. I mean, I understand the issue is what Mr. Dhall knew, but the way it's framed, it seems to be speculative as to what --

THE COURT: So your objection is based on the assertion that it calls for speculation?

MR. SCHNEIDER: Correct.

THE COURT: Repeat the question now.

MS. KIM: I can rephrase the question, Your Honor.

THE COURT: All right.

BY MS. KIM:

Q Do you know if Mr. Dhall was aware of TERiX's policy on one-to-many?

A Yes.

Q How do you know that?

A Well, one-to-many was the process that was memorialized in Snoe Wight. The TERiX handbook made it very clear that the process that they were using was to put one computer under coverage and use that to support as many as thousands of computers.

Again, Mr. Joyce told us that Mr. Dhall helped author that document.

In addition, there's email correspondence with Mr. Dhall where Mr. Dhall is ordering Mr. Joyce to purchase -- they used the code word "Boeings" for part of it, to purchase these one-to-many support contracts.

Q Do you know if Mr. Dhall was also aware of T-Patch?

A Yes.

Q What is T-Patch?

A T-Patch is a -- an automated tool. So the -- the normal way that the fraud carried out was one of the TERiX employees would have to log into the victim's website and download

intellectual property on a manual basis.

T-Patch was designed to automate that process and make the process smoother, in direct violation with Oracle's terms of use, and Mr. Dhall was aware of T-Patch and aware of its use to download intellectual property.

Q You said before that Mr. Dhall served as a conduit between him and the executive team. Would Mr. Joyce relay any concerns he had to Mr. Dhall?

A In many instances, yes.

Q Do you have any specific examples of any of those instances?

A Yes. So, in June 2011, Mr. Joyce became of the opinion that at least a core portion of Snoe Wight was illegal, and he was afraid of the consequences of that, and he relayed that belief of the possible illegality of what he was doing to Mr. Dhall directly.

Q How did he relay that?

A By email.

MS. KIM: Your Honor, I have the email if the Court would like to see it.

THE COURT: Yes.

MS. KIM: May I please approach --

THE COURT: We need to have the agent identify it.

MS. KIM: -- the witness and the Court. Yes. Can I show it to him first, Your Honor?

THE COURT: All right. All right.

BY MS. KIM:

Q I'm showing you what's been marked as Exhibit 710.

MS. KIM: And, Your Honor, for the record, defense counsel has been provided with this exhibit in advance.

Q Do you recognize Exhibit 710?

A I do.

Q What is this?

A This is an email chain between Jason Joyce and Atul Dhall. The email chain started on June 15th, 2011, and ran through June 27th, 2011.

Q And is the email you were just referring to on page 2 of this exhibit?

A Yes, it is.

Q And can you point out the relevant portions for the Court?

A Sure. The relevant portion is -- is the highlighted text at the bottom of page 2. I'll focus on the absolute last portion that's highlighted.

It says, "I've been thinking about the Tank process of purposely buying a contract for non-Sun hardware and then turning around and providing patch access for a Sun box. This cannot in any way be aboveboard, and I will not participate in this process once the FDC is finished.

"I am sorry, but if worse came to worst, I do not want

to be a part of the ramifications. I need to protect my family. I feel I'm protecting them, even if we take a short-term hit, because this decision costs me my job."

Q Do you know what happened after this email was sent from Jason Joyce to Atul Dhall?

A I do.

Q What happened?

A First of all, Mr. Dhall was not in the office when this email was sent, so as a short-term placeholder, Mr. Dhall asked Mr. Joyce to not do anything rash and to wait until he returned to the office.

Mr. Dhall then spoke with Mr. Appleby about this situation, and Mr. Appleby convinced Mr. Dhall, who then convinced Mr. Joyce, that what they were doing was -- had been vetted by legal review and was completely in accordance with legal documents and was aboveboard and that Mr. Joyce needed to remain at TERiX.

MS. KIM: Your Honor, at this time I would like to offer Exhibit 710 into evidence.

THE COURT: Any objection?

MR. SCHNEIDER: No objection.

THE COURT: It is admitted.

MS. KIM: That concludes my testimony on the knowledge portion of Mr. Dhall.

If the Court would like, I can go into whether the

conspiracy was otherwise extensive.

THE COURT: I think the main issue for the Court, and the one most likely to resolve this objection, is the issue of knowledge. Do you have any more questions on knowledge?

MS. KIM: I do not, Your Honor. Thank you, Agent Fine.

THE COURT: All right. Mr. Schneider, you may cross-examine.

MR. SCHNEIDER: Yes, I have a few.

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CROSS-EXAMINATION

BY MR. SCHNEIDER:

Q Agent Fine, just to make sure that I understand this exhibit here, you indicated that Mr. Dhall had been traveling, correct?

A Correct.

Q Okay. And that essentially what he said was don't do anything rash until I get back, correct?

A Correct.

Q And then Mr. Joyce follows up with him, as I understand the email chain here, and then says did you have a discussion with B.A. -- which I assume is Mr. Appleby; do you see that?

A Correct.

Q But -- but -- but Mr. Dhall then replies, "I did. I need to have one more discussion, but I also verified the same

with outside counsel and can give you details."

A Correct.

Q Do you have any reason to doubt Mr. Dhall did not verify that with outside counsel?

A Well, I think that you are -- are you asking about a specific outside counsel?

Q No. I'm asking you, since you commented on this email thread, whether or not you have any reason to doubt the veracity of Mr. Dhall in the June 27th reply to Mr. Joyce that says, "I also verified the same with an outside counsel and can give you details"?

A Mr. Dhall, in response to this email, approached a family friend who is an attorney, so I do know that that statement is true, and he asked that attorney in general terms what the -- what the legality of the situation might be.

Q Okay. All right. And do we -- you don't have any firsthand knowledge that Mr. Dhall knew that there was criminal activity, do you? Just that he was aware of what Mr. Joyce had raised concerns about -- in the context of this email?

A Well --

THE COURT: Did he tell you what the lawyer told him?

THE WITNESS: Well, he told -- so the way that that interaction worked was the lawyer basically said that he needed more information. He needed all of the information to make any sort of informed legal opinion.

Mr. Dhall then spent the next six to nine months requesting a full legal review by that attorney from Mr. Appleby, because it wasn't Mr. Dhall's place to do that for the company.

Mr. Dhall had reservations about the legality of the conduct based on this email. After about six to nine months of -- I believe the word they used was "pestering" Mr. Appleby demanding this legal review, Mr. Appleby did agree to the legal review in early 2012; however, that legal review was never conducted and it was -- anything that was delivered was delivered between Mr. Appleby and that attorney directly, and Mr. Dhall had removed himself from that process once Mr. Appleby agreed to it.

So no legal opinion was ever provided, I think, largely due to the timing of the filing of the civil lawsuit.

THE COURT: All right. Thank you.

BY MR. SCHNEIDER:

Q But is there anything to suggest that Mr. Dhall had anything more than a suspicion about the legality? That's what I'm asking you.

A Mr. Dhall knew that the aliases that were being used, and the prepaid phones that were being used, and the facilities that were being used, did not represent real people. He knew that those -- all of those trappings of the conduct were not based in reality or fact.

He knew enough about the situation to be concerned about the legality of it and talk to an attorney, and he directed the conduct from approximately 2010 through 2014. So, yes, I --

Q And as part of your investigation, including interviewing Mr. Dhall, correct?

A Correct.

Q And you chose not to prosecute him, correct?

A I'm an FBI agent. I don't make prosecution decisions.

MR. SCHNEIDER: Nothing further, Your Honor.

THE COURT: All right. Anything further, Ms. Kim?

MS. KIM: No, Your Honor. Thank you.

THE COURT: All right. Thank you very much, sir. You may step down.

THE WITNESS: Thank you.

THE COURT: Does the Government have any additional evidence on this issue?

MS. KIM: Not on the knowledge issue, Your Honor.

THE COURT: All right. Mr. Schneider, do you wish to introduce any evidence -- produce any evidence or call any witnesses on this issue?

MR. SCHNEIDER: No, no affirmative evidence, no witnesses, just the ability to comment at the appropriate time.

THE COURT: All right. I would be pleased to have final comments on this issue.

Mr. Schneider.

MR. SCHNEIDER: Thank you. Just -- just very briefly. I just think that, if anything, the exhibit that was put in front of you, which is the email communications, although it expresses concerns by Mr. Joyce to Mr. Dhall, one, Mr. Dhall -- I mean, I don't think -- I think it's a reach, a tremendous reach, to say that he was aware of criminal activity and did anything to furtherance -- in furtherance of the activity such that he would be prosecuted.

Because if you read the -- the language in the communications between the two parties, one, he's traveling. Mr. Joyce says, "I understand you don't have any sleep."

All Mr. Dhall says is, "Hold on. Time out." Then he has a conversation with Mr. Appleby but also verifies -- says he needs to verify and did verify with outside counsel that it's not -- that -- that at least there was a comfort level that was given to him, and I think just to, in a courtroom like this, based on this evidence, to jump from a conversation that a supervisor has had with an employee who expresses concern -- even to call it potential whistle-blowing -- based on this though, to say that he's a co-conspirator in the participancy sense for purposes of the Sixth Circuit's analysis of enhanced role, I think, is a stretch.

I don't think that Ms. Kim carries the burden on that. Maybe it's a close call, but I don't think that based on the *Anthony* case and the *Lewis* case, which I already talked about,

if that is strictly applied to this case, I don't think Mr. Dhall is a participant for purposes of an enhancement.

I think an enhancement would be improvident under those circumstances. I think it's a stretch. That's it.

THE COURT: All right. Thank you, Mr. Schneider. Ms. Kim.

MS. KIM: I would ask that the Court credit Special Agent Fine's testimony. I think the evidence proves, at least by a preponderance, that Mr. Dhall was aware of the conspiracy and its criminal objective.

Agent Fine testified that he was involved with Summit and that he knew it was not a real company. He also testified that Atul Dhall knew of the fake credentials and their use for downloading Oracle's intellectual property fraudulently.

He also knew about the one-to-many policy, which was in direct violation of Oracle's policy, and of T-Patch, another direct violation of Oracle's policy. He knew about Snoe Wight. He knew about ClearVision. He knew about other certain covert steps that TERiX undertook to hide detection from Sun and Oracle.

For those reasons, we believe that the enhancement clearly applies. Thank you.

THE COURT: All right. Well, the Court is going to deny this objection.

The Court is convinced by a preponderance of the

evidence, if not more, that Mr. Dhall was a knowing participant in this conspiracy.

It really isn't rocket science. It's pretty simple. This conspiracy involved the theft of valuable intellectual property. That property belonged to someone other than TERiX.

Anyone involved with the underlying business and the underlying technology would be quite aware that this was intellectual property, and certainly these individuals, including Mr. Dhall, was aware that it didn't belong to TERiX and that they were taking it from Oracle, and that they were taking it from Oracle by the use of a very sophisticated scheme of deception and concealment, and Mr. Dhall was aware of all of those underlying facts.

The only question that's been raised about it is whether that -- whether he might have been convinced to have some -- some belief that this could somehow be justified, but he was aware of the basic facts, and those basic facts add up to a knowledge that a fraud was being perpetrated.

So the Court finds that the probation officer's calculations are correct and that there should be a four-level enhancement in this case.

He not only was aware of the fraud, but he participated in carrying out the fraudulent scheme. Indeed, I believe there was a concession that the only issue here is whether he knew that what he was doing involved the facilitation of a fraud,

and the Court is convinced by a preponderance of the evidence that he was.

So were there any other objections that would affect the guideline sentencing range in this case, Mr. Schneider?

MR. SCHNEIDER: There are not.

THE COURT: All right. Ms. Kim, the Government doesn't have any?

MS. KIM: No, Your Honor.

THE COURT: Now, returning then to the issue of whether the Court should accept the Rule 11(c)(1)(C) plea agreement in this case, the Court has determined that the probation officer's calculations regarding the guideline sentencing range are correct, that the guideline range is 51 to 63 months of incarceration, and a term of supervised release of one to three years, and a fine ranging from $10,000 to $100,000.

This plea agreement calls for a sentence no greater than 60 months and a fine as determined by the Court. Here, the probation officer has recommended a sentence of 60 months and a two-year term of supervised release and a fine of $25,000.

Now, the nature and circumstances of the offense involved a conspiracy to acquire software patches by the creation of false entities and misrepresentations.

The defendant, Mr. Appleby, directed others, including Olding, Quinn, and Joyce, to perform acts in furtherance of the

conspiracy, and Dhall was also involved knowingly in performing acts in furtherance of the conspiracy.

Here, the defendant has no prior criminal record. He's been married for over 39 years. He's been steadily employed. He's currently the CEO of TERiX.

The Court concludes that the agreed sentence in this case is sufficient to reflect the seriousness of the offense and promote respect for the law and to provide just punishment and to afford adequate deterrence and to protect the public from any more crimes by the defendant.

The Court notes that the agreed-upon restitution in this case has been paid.

So the Court finds that this Rule 11(c)(1)(C) plea agreement is reasonable and the Court is going to exercise its discretion and adopt the plea agreement, and that leaves for further determination today just what sentence is appropriate in this case.

In arriving at a sentence, the Court is called upon to consider a wide variety of factors, and those factors include the nature and circumstances of the offense, the history and characteristics of the defendant, the need for the sentence to reflect the seriousness of the offense and promote respect for the law and provide just punishment, as well as the need for the sentence to afford adequate deterrence, and to protect the public from any more crimes by the defendant as well as the

need for the sentence to provide the defendant with any educational or vocational training, medical care, correctional treatment in the most effective manner.

The Court should always consider the kinds of sentences available, and the Court should strive to avoid unwarranted sentencing disparities among defendants.

So with all of those issues in mind, and any others that may be relevant to the final issue, which is what sentence is sufficiently severe, but no more severe than necessary, to accomplish all of the goals of sentencing, the Court would like to have statements from counsel.

Before doing so, I would like to ask Mr. Appleby if he wishes to make a statement on his own behalf. Do you, sir?

I would like for counsel and defendant to return to the lectern; and, Mr. Appleby, if you have a statement, I would be pleased to have it, sir.

THE DEFENDANT: Yes. Thank you, Your Honor. I have disrespected the law. I have caused great harm and also hardship. I apologize to the Court for my actions. I apologize to Oracle. I apologize to my wife Christine, my sister Maggie, my friends, my family, also my employees, many of which have been -- have been drastically impacted, okay, by my actions. I've had to lay them off, and there have been bad consequences for those families.

When I created the WEX log-ins, I didn't know it at the

time but I do know now that what I had done was wrong. When the Sevanna log-ins were determined later on -- I should say that I confirmed later on that the downloads from Sevanna were being used to send patches out to clients that did not have the rights to them, I did not stop that process. Your Honor, I should have.

My takeaway from this is that my disrespect for the law has broad and devastating consequences not just for me but for the hundreds of people that have been affected by this.

Your Honor, I've learned my lesson. You will not see me again, Your Honor. I beg the Court's forgiveness and also leniency.

Thank you.

THE COURT: Thank you for your statement, sir.

MR. SCHNEIDER: Your Honor, I know that it's generally not your protocol, but would the Court indulge hearing very briefly from Mr. Appleby's wife?

THE COURT: I have read a very compelling letter from Mrs. Appleby, and I appreciate receiving it. Indeed, I have received many letters of support on behalf of Mr. Appleby. I've read every one of them, and I want those who wrote letters to know that the Court has read them and the Court appreciates receiving them.

They do give me significant insight into Mr. Appleby's character and his many contributions to the community and to

his employees and to his friends. So those are all very much appreciated.

MR. SCHNEIDER: Okay.

THE COURT: I would like to have statements from counsel now.

MR. SCHNEIDER: Thank you. Do you want Mr. Appleby --

THE COURT: He can stay right there.

MR. SCHNEIDER: I appreciate this opportunity, and I want to say for purposes of the record Mr. Appleby comes before you as the fourth person that has had to face this Court, and with respect to the other three, the -- I'm not sure that the narrative on what really transpired that caused the crimes to be committed was ever fully vetted based on just simply the way those proceedings took place, and I wanted to -- and I tried to in the sentencing brief, and I won't necessarily cover all the same ground, but I think it is, for purposes of the nature and circumstances of the offense, particularly in light of Mr. Appleby standing in front of you, particularly important that the Court try to understand the dispute that occurred in the civil context, the basis, and the allegations of that dispute, and how it played out just to get a better understanding of the nature and circumstances of these offenses under 3553(a)(1).

So here's what happened. In early as -- well, let me back up: So there's a Solaris operating system that was

created by Sun whenever -- I don't know exactly when that was but in the early 2000s. The Sun Solaris operating system was a system that TERiX would provide service for.

TERiX is in the business of being a third-party maintenance firm, and in those cases Sun had -- when it would sell hardware and software, it would license that, and so the license language is pretty clear, that there was a license to use and that Sun granted each licensee, so anyone who purchased the Sun equipment, for whom might have been a TERiX customer, Sun grants you a nonexclusive and nontransferable license for the internal use only of accompanying software and documentation and any error corrections provided by Sun, by the number of users in the class of computer hardware for which the corresponding fee has been paid.

That is what rooted this understanding on the part of TERiX that it could provide service for customers that were Solaris subscribers, because their customer had license rights that entitled them to bug fixes and software maintenance.

Then enter -- and that license that I just read you just for purposes of the record -- I guess it doesn't really matter, but there were Solaris 7, 8, and 9 operating systems. Then came along the Sun 10 operating system, and that had a little different license to it, and there had been some dispute at that point in time starting to come about between Sun -- this is before Oracle, Your Honor. Oracle didn't acquire Sun until

2010, but there started to be some back and forth, some interaction between Sun and TERiX, and TERiX then sought counsel, and I attached this to the brief, but Steve Foletta, he's a credentialed intellectual property lawyer in the Silicon Valley area, was engaged, and on this idea that the license rights that TERiX customers might have, and Mr. Foletta opined in 2006 to TERiX -- TERiX is the client -- a private patch should be considered an update for the Solaris 10 operating system software that is covered by the Solaris 10 SLA and B accordingly. The license in the Solaris 10 should permit that customer to install the update on all customers' boxes.

Mr. Foletta, within just a couple weeks, in a more detailed analysis, opined that he believes that TERiX had a very strong and safe position in using the procedures and methodologies to obtain public and private patches for the Solaris software for such customers without violating or infringing on any of Sun's copyrights. I paraphrased that, but that letter is attached to the brief.

So this -- this -- and I try to say this in the brief, and maybe I can say it better now. Maybe I said it better in the brief than what I'll say now, but this methodology started, sanctioned by counsel, that if you are a Sun subscriber of a Solaris system and you have a license and the license language is X, you have the right to those software patches.

When it became a -- and TERiX would have the right to be

able to go in and provide that maintenance for you because it's your -- they are your patches under the license.

Well, when there became an issue then with -- with that, and Sun didn't like that, then vetted with counsel, still Steve Foletta, later Tom Armstrong, another credentialed lawyer, the idea was, well, if you are the licensee, you have every right to be able to assign the license.

So the methodology changed from simply being able to go into the -- and download patches to service Hewlett-Packard or Verizon or Credit Suisse, to getting the client, the customer, Hewlett-Packard, to assign the license rights.

Again, that was rooted in counsel's opinion and vetted with counsel.

Oracle acquired Sun in 2010; and Oracle, looking at the entity that it acquired, obviously made a determination that third-party maintenance servers are not something that perhaps they want to compete with. And they decided, in Mr. Appleby's view, in TERiX's view and in TERiX's counsel's view, that the license language is bilateral. You can't unilaterally change it, but Oracle simply decided to change that -- in a unilateral basis -- that third-party maintenance of Solaris software was off limits, and, well, that didn't deter. That's the problem here.

We're talking later in the game than perhaps what the Government would suggest. That's what -- there's when TERiX --

and Mr. Appleby admits this -- the methodology sort of morphed again, because now Sun -- who really is sort of a Goliath of a victim in a lot of ways -- was saying no, and they continued to find ways to be able to service their customers.

I want to say that also for purposes of -- so that's the dispute, and it was a hard-fought dispute. The case was filed in 2013. It initially settled in 2015. That happened about a month after a search warrant was executed on the Dublin, Ohio, TERiX offices. The case settled.

The fulfillment of that settlement didn't come about the way it was supposed to, so there was some renewed litigation. They finally settled, as this Court knows, last February.

But the point is it was vigorously fought. It was hotly contested up until the point when TERiX had to sort of fish or cut bait and decided for a lot of reasons that -- why people settle cases, to settle the case, and I know Mr. Hollenbaugh in this court told you sort of the same thing when Mr. Olding stood in front of you, that there was a business decision that was made.

But in furtherance I've attached a letter from a TERiX -- the -- the way the -- because WEX, Sevanna, and Summit were also named as defendants in addition to TERiX. TERiX had counsel different than WEX, Sevanna, and Summit. They are all part of this case, but John Picone has tendered a letter that I've attached, I think, as Exhibit D to my brief that -- that I

think is important for you to understanding the gravity of the offense here, and what Mr. Picone had indicated is that there were serious issues relating to the viability of Oracle's copyright claims, that there were antitrust claims that could have been brought, and thought about being brought, that could have radically reshaped the case.

And the -- and there's a point on that -- I don't want to belabor it, you know, because then I run a fine line here as well, but -- but Mr. Appleby was with a trade association at the same time and was getting the trade association interested, piquing their interest in maybe Oracle is committing some sort of anticompetitive thing here, and as soon as Oracle got wind of that, then things even got rougher in the -- in the civil suit, but in any event, Mr. Picone, he opines had the antitrust claims been brought, it could have radically reshaped that. Maybe we wouldn't be here. Maybe we would. I don't know.

He also indicated that -- that the damages that Oracle had alleged were probably grossly inflated, but we're -- we're beyond that, but I think the point here is that as bad -- I mean, there's wire fraud in this case.

There's no doubt. There's wire fraud. There were false credentials that were used, but the way it's been -- the narrative that's been given to this Court up to this point in time, because of the way the case has played out, and -- and -- and there was not necessarily a need, this really didn't start

in a backroom in 2003 or 2004 or, as this information says, in 2005 with an intention to get behind Sun and infringe on its copyright or to do the same with Oracle.

It was -- it started with the most earnest understanding of a customer's license rights. It morphed to the customer's right to assign those rights, so that there was agency in place, to then the more downstairs, perhaps nefarious, ways to get behind.

One other thing -- a couple other things that I want to say that I think might have an impact on the Court is that -- that when a -- Solaris 8 -- Solaris 8 came out with a new -- a new program, it had a different license, and TERiX read that license and realized that probably couldn't be assigned. They weren't going to do business, so they -- they didn't go in and try to provide maintenance on customers that had subscribed to the Solaris 8 Vintage.

They still thought they could do it with 7, 8, 9. They thought they could do it through agency with 10, but they didn't bother that; and had they wanted to poach that business and be able to service that, they could have, but they didn't find ways to -- to sneak around and to do that.

TERiX also, at its own expense, developed a number of patches for Solaris -- daylight savings patch at its own expense, free.

So this is -- I just don't want this Court to have a

feeling here that TERiX is a bunch of executives in a backroom that were going to go out and do things the cheap way.

This is -- this is a highly competitive business. Third-party maintenance firms. Try to survive. They provide a valid function.

Their client list is amazing. And Hewlett-Packard, even during this dispute, Hewlett-Packard became one of their best customers by having its own in-house counsel and others investigate what TERiX was doing.

They kind of came to the conclusion, "I think TERiX is probably okay," which goes back to what Picone said. You know, this case never was litigated to conclusion. The infringement claims may be marginal, may be not. That's water over the dam.

The other thing I want to say is that there's a level of transparency here that doesn't get captured necessarily in Agent Fine's testimony, but he mentioned the ClearVision.

Can you imagine that you have got counsel that has helped develop some of these protocols or at least opined that you can do it, and then you present to large corporations' I.T. departments, in many cases with their in-house counsel on the phone, a 90-minute presentation, "Here's what we're doing."

There's a level of transparency there that, I think, sets this case apart perhaps in ways that other -- I mean, most of the fraud cases you see don't have sort of that level of transparency, I suspect.

So those are points that I thought were worthy to make, because I think having a flavor for the litigation and how the company started off before it morphed into some of the darker things that it did that brought it before this Court is important, because I don't think the Court has heard that before.

There are -- in a statement of facts, they are talking -- you know, there's a listing of 2,713 downloads, if we had gotten into this in much detail. Eighty percent of those downloads were not used for customers. They were used for internal purposes.

Mr. Appleby -- we sort of fought over this, this idea of being able to have an alias and get a service contract for your own use. He's not sure that that was criminal. I had to suggest to him that it probably is, but he -- I say that to this Court because they weren't thinking in those terms at the time.

They thought that if Oracle wasn't going to allow them a service contract, they would find a way to get a service contract. That's part of the conspiracy. That's why they're here.

We're not minimizing that, but I say that for whatever benefit that that is, and then -- and then finally I want to say that -- I don't know that I need to go through all the history, character, and background. We're just on the nature

and circumstances of the offense.

But if I -- if I'm speaking in total mitigation, I would like to say that from the time that certainly this criminal proceeding commenced, and you heard Mr. Appleby tell the Court that there have been some, you know, some economic strident issues with respect to TERiX.

Mr. Appleby, not his co-defendants, has been the one that has personally subsidized the company, to keep people employed; and also if you were to look at the 11(c)(1)(C) stipulated loss amount of $1.2 million, which arose out of a confidential mediation in this case, that was satisfied and funded, and that was funded from Mr. Appleby and his resources and not those of his colleagues, to the extent that the Court wants to look at that as some form of mitigation.

I want to say that, you know, I mean, he is 66 years old. Just this past weekend, I'm dealing with him getting ready for this sentencing while at the same time he's trying to enjoy his 40th wedding anniversary with Christine.

They tried to get away for the weekend, and they got away for the weekend, but he was on the phone with me, and we were emailing back and forth, and so -- so this individual comes in front of you, Your Honor, 66 years old, totally law-abiding, as hard a worker as you are going to find, perhaps thinks a little differently. Maybe that's his background. Maybe that's the I.T., the intellectual property background,

maybe the engineering side of him.

It's not all -- you know, he sees things a little differently. I think that when he stands in front of you and he tells you that he gets it, and that he accepts responsibility and he knows that what he did was wrong, he means it. He's not doing that just, you know, to try to work something over on the system here. When he tells you that he's learned his lesson, I truly believe that.

So you've all the -- you've got the character letters. I mean, it certainly appears -- those are not filtered letters. I didn't talk to any one of those individuals before they wrote that letter. I don't think Mr. Appleby did that either.

I think there's -- the general theme is that he and his wife, I mean, they are sort of a union in that regard, are just very open with very many -- with a lot of people. They are very gracious. They have stepped to the plate to help other people, and I think that that speaks well for him in mitigation.

I understand that this Court has made its ruling on his role, and that that sets him apart from those of his colleagues, but I would say, given what he's done to keep the company going, given what he's done to sort of repay the obligations to Oracle in this case personally, and -- and this Court, hopefully, having a little better flavor for the nature and circumstances of the litigation and that there were still

claims and still people that think TERiX might have been more right than wrong, or Oracle might have been less right than wrong, I think that a sentence that would be sufficient, not greater than necessary in this case, would be something really along the lines of that of Mr. Olding, but -- but -- but the five-year recommendation from Ms. Boucher and Ms. Kim in her sentencing brief, I think that that would represent a five-time -- a -- a times five level over that of his co-owner and colleague, and I think that that would be greater than necessary to accomplish the sentencing objectives here.

I don't think the deterrence issue -- I mean, I've spoken to the deterrence issue in the brief. He doesn't need rehabilitation.

You know, he's just -- I think he's an individual that, based on his history, character, and background, and if you -- if you -- if you put that in the blender with the nature and circumstances of the offense, I think that a sentence -- a substantial departure from the five-year recommendation is warranted in this case.

I don't want to get ahead of myself here, but I did have a conversation with Ms. Kim -- we can address that maybe later -- as to whether or not the Court might indulge itself to staggering his sentence such that any sentence that is imposed on Mr. Appleby in the -- in the incarceration sense were to begin when Mr. Olding completes his one-year, one-day sentence

for the benefit of the 100 employees that presently are still employed at TERiX, and there's some other entities, some international, that are part of the TERiX family, and it really seems that both -- that Mr. Olding and Mr. Appleby are the two irreplaceable ones; and if they are gone at the same time, I think that that reaps a consequence on others that this Court could avoid, and maybe I'm ahead of myself on that.

That's all I have in mitigation at this point, Your Honor.

THE COURT: Very well. Thank you, Mr. Schneider. Ms. Kim.

MS. KIM: Thank you, Your Honor. With respect to the nature and circumstances of the offense, I would like to clarify a couple points that Mr. Schneider made.

Putting aside and assuming everything he represented about the license disagreement between Oracle and TERiX were true, we know for a fact that in 2005 Mr. Appleby created the Richard Aarons alias, and in 2008 Oracle was very clear, or Sun back at that time, was very clear that they wanted TERiX to stop doing that, to stop probing, to stop doing the time and materials calls.

Things that were not vetted by counsel, and this is -- these are facts -- were the code names that were being used, the Boeing Process, the Tank Process, Plan E, Run Silent, Run Deep. That was never vetted by counsel.

Using fake aliases and credentials to log in undetected to download patches, intellectual property from Sun and Oracle undetected, never vetted by counsel. Using prepaid credit cards, never vetted by counsel. Using fake email addresses, unauthorized, never vetted by counsel. Using fake addresses. For example, for Sevanna, they used the Santa Clara Convention Center's address as the registering address. He also used his sister as a registering agent on the formation documents. That was never vetted by counsel.

So it's inaccurate to say that all aspects of this conspiracy were vetted by counsel. They were not.

I also want to point out that TERiX is not being sentenced here today. Mr. Appleby is. And the Court has already found that Mr. Appleby was, in fact, the leader and organizer of this conspiracy.

He devised this conspiracy. He orchestrated the conspiracy. He directed every aspect of it, and he approved every aspect of it.

Every single co-conspirator points to the defendant as the mastermind of this fraud that spanned nearly a decade.

He is by far the most culpable defendant in this conspiracy, and that warrants the imposition of a severe punishment.

There are, however, some mitigating factors. His history and characteristics, he has no criminal history, and I

think it's clear that he has accepted responsibility as revealed by his remarks today; and with that in mind, that's why we crafted the 60-month cap in the (c)(1)(C) plea agreement that the Court has accepted.

However, the sentence must reflect the seriousness of the offense, and here the defendant committed a very serious offense that spanned nearly ten years.

This sentence must reflect that seriousness; and a 60-month sentence, which is toward the higher end of guidelines, will do just that.

There's also the need for adequate deterrence -- deterrence, and that's both general and specific.

With respect to specific deterrence, the defendant needs to understand what he did was wrong, unlawful, and it won't be tolerated in the future; and as for general deterrence, other business owners need to know that they will be punished for these types of activities so that they are not tempted to follow the defendant's path.

For those reasons, Your Honor, we would respectfully request that the Court impose a sentence of 60 months' imprisonment, two years of supervised release, and at least a $25,000 fine.

All of that would be sufficient, but not greater than necessary, to achieve the goals of sentencing in this case. Thank you.

THE COURT: Thank you, Ms. Kim.

I've outlined in a general way the factors the Court is called upon to consider in arriving at a sentence. I would like to focus now on the ones that I think are most compelling in this case. I must begin with the seriousness of the offense.

This case does involve an extensive and sophisticated conspiracy, which had high stakes, which caused significant damage, and was in a -- a large and sophisticated fraud, and the Court's sentence should reflect the seriousness of the offense.

The history and characteristics of the defendant are a very important factor in this case. Mr. Appleby stands before the Court with no criminal record whatsoever. He's been a -- an upstanding member of the community throughout his life, and his involvement in this fraudulent activity takes on a -- something in the nature of aberrant behavior on his part.

The Court is not concerned that he would be likely to repeat this kind of activity in the future, and just the prosecution and the consequences of the discovery of the fraud in themselves are likely to be a powerful deterrent in this case.

The Court has received many, many letters of support, which reflect the fact that Mr. Appleby is -- other than his involvement here -- a very responsible and creative and

productive member of society.

This case may well have started out with some feelings that -- that TERiX was standing in the role somehow as a protector of the rights of its customers with respect to the licensing agreements and the rights that they received as purchasers of technology from Sun and Oracle, and with some -- maybe with some feeling that they were going to stand up for the, quote, little guy, and perhaps with some initial credibility to feeling that the earlier licensing agreements permitted them to service their customers by providing patches.

But long before -- well, long before this prosecution began, the circumstances had significantly changed, and it was quite clear to Mr. Appleby and his co-defendants that they were participating in fraudulent activity which misappropriated the intellectual property of someone else, and the sophisticated way in which they concealed what they were doing and misrepresented the true nature of what they were doing by creating fictitional entities and concealing of the facts from Sun and Oracle, those activities in and of themselves, the concealment about what they were doing, speaks volumes about their knowledge that it was wrong, and they continued down that path for a significant period of time.

I've made a ruling on the four-point enhancement in this case for a conspiracy that involved at least five people and was otherwise significant, and the sentence that I'm going to

ultimately impose in this case would be the same whether I reached that conclusion or not.

If I had granted that objection, I still would have supported and concluded that a two-level enhancement should be imposed in this case, and that would have given us a total offense level of 22, with a guideline sentencing range of 41 to 51 months.

It's my conclusion that the sentence that would serve all of the purposes of sentencing and would be sufficiently severe to reflect the seriousness of this offense is a sentence significantly at variance from the guideline sentencing range, even from the lower range that I just mentioned, the 41 to 51 months.

The Court believes that Mr. Appleby has sincerely accepted responsibility for what he has done, that he presents little risk of recidivism, and the Court believes that a sentence of 24 months' incarceration would serve all of the important goals of sentencing in this case: that it would reflect the seriousness of the offense; that it would afford adequate deterrence; that it would protect the public; and that it would be a sentence that is sufficiently severe, but not more severe than necessary, to accomplish the goals of sentencing.

The Court is going to impose a sentence of 24 months' incarceration in this case. That will be followed by two years

of supervised release.

The Court is also imposing a fine in this case, and the Court believes that it will add to the reflection of the seriousness of the offense, and the Court is going to impose a fine of $100,000 in this case. I'm also required to impose a statutory special assessment of $100 and will do so as part of my sentence.

Restitution would be an important part of the Court's sentence, but it is my understanding that the restitution has been paid in this case. Am I correct, counsel?

MS. KIM: That's correct, Your Honor.

MR. SCHNEIDER: It is, Your Honor.

THE COURT: All right. I'm going to waive any requirement of interest on the fine that I've imposed in this case.

Now, as is often the case in any criminal activity, there are other victims other than the primary victim, and these collateral victims in this case often include family members. In this case, they include many innocent employees of this company who have devoted years of their lives to their employment with this company.

It may be that the company has some future and that the Court can, by structuring its sentence here, at least provide some opportunity that that might be the case.

There are two principals in this business. Mr. Appleby

was certainly the -- the primary organizer and manager of this business operation. He was -- he had a person who was somewhat like the junior partner, and that, of course, was Mr. Olding. Mr. Olding has perhaps the capability of continuing to run the company.

I'm going to permit Mr. Appleby to begin serving his sentence in this case on the date that Mr. Olding is released from confinement on his sentence of one month and -- for 12 months and -- one year, with the hope that there may be some relief for the innocent victims of this offense, the collateral ones that I mentioned.

Now, counsel, do either of you see any legal impediments to the sentence the Court has just announced or do either of you have any objections that the Court has not already ruled upon? Mr. Schneider, do you?

MR. SCHNEIDER: No, Your Honor.

THE COURT: Ms. Kim, do you?

MS. KIM: No, Your Honor.

THE COURT: Now, counsel and perhaps our probation officer can assist me in adding any additional stipulations that will assist in carrying out the Court's intention that Mr. Appleby begin serving his sentence within a reasonable period of time after Mr. Olding has completed serving his sentence.

Counsel, can you help me on this?

PROBATION OFFICER: Your Honor, I may suggest, if you hold back the J&C, I can notify the Court when Mr. Olding is released into a halfway house. I've seen that done in the past. If the J&C is held back, then that would delay the -- the voluntary surrender date.

THE COURT: All right. Let me see what -- Mr. Schneider, do you have any thoughts?

MR. SCHNEIDER: I thought Mr. Olding's sentence was one year and one day, and I didn't know --

THE COURT: Has he begun serving that sentence? Does anyone know?

MR. SCHNEIDER: Yes, he has.

MS. KIM: Yes.

THE COURT: He has. All right. Ms. Kim, do you have any suggestions?

MS. KIM: We can look into when exactly he may be released; but with good behavior, it would probably be less than 12 months. My calculations would put him going in about mid February, since he was sentenced at the end of January, with a 30-day voluntary surrender notice. If the Court would like, we can look into it.

MR. SCHNEIDER: He just --

THE COURT: We'll take a brief recess. I would like to talk with our probation officer.

COURTROOM DEPUTY: Please rise. This court will stand

in recess.

(Recess taken from 10:54 a.m. to 10:58 a.m.)

THE COURT: All right. Counsel, here's what we're going to do: The Court is going to stay execution of the incarceration part of its sentence in this case until further notice.

The probation office is going to track Mr. Olding's case and advise the Court when it would be appropriate to put on an additional order calling for the execution of the sentence of incarceration.

Counsel, we'll be notifying you. There are various things that might occur. Mr. Olding's release date, it looks like it would be somewhere in February.

He could be released to a halfway house earlier than that, and that might -- the conditions of that release to a halfway house might permit him to return to his employment, and then the Court would put on an order that would require Mr. Appleby to begin serving his sentence of incarceration.

So the Court is going to impose the sentence that has just been announced. It's going to stay the execution of the sentence of incarceration until further order of the Court.

Now, Mr. Appleby, please stand, sir. Was there a waiver of appellate rights in the plea agreement?

MS. KIM: Yes, Your Honor.

THE COURT: And -- but there is --

MS. KIM: Except for the two bases, ineffective assistance of counsel and prosecutorial misconduct.

THE COURT: All right. Mr. Appleby, you have certain limited appellate rights. If you desire to exercise those rights, you would have the right to have the clerk of this court file a Notice of Appeal on your behalf. You would have the right to have counsel appointed if you couldn't afford counsel and to have the Government pay the costs of any such appeal and, as I said, to have the clerk file a Notice of Appeal on your behalf.

Please consult with your counsel and tell me whether you want the clerk to file a Notice of Appeal.

THE DEFENDANT: No.

THE COURT: If you do desire or intend to appeal, you must file a written notice within 14 days. Do you understand that?

THE DEFENDANT: Yes, 14 days.

THE COURT: All right. Counsel, is there anything further on this case today on behalf of the Government?

MS. KIM: No, Your Honor, thank you.

THE COURT: Or on behalf of the defendant?

MR. SCHNEIDER: There is, Your Honor. During the pendency of this case, and really through the initial benevolence of Ms. Kim, Mr. Appleby was able to retain his passport because he does have some travel and some of the TERiX

businesses are international.

Just during your recess, I had the conversation with Ms. Kim again about that, but I would be making the request that he would be able to retain his passport until he has to surrender. I hope I'm not pushing the envelope here too much.

THE COURT: Ms. Kim?

MS. KIM: I leave this at the Court's discretion, Your Honor. The original reason we allowed him to have it is to continue and maintain the business.

If the reason we are holding off on the execution of the imprisonment is to maintain the business, then I am fine with that going forward, but we are in a different position since he has now been sentenced.

I will note for the record we've had no problems with him on pretrial supervision.

THE COURT: I don't think he's a risk of flight; and if his continued management of the business requires travel, then we're going to let him keep his passport until he reports.

MR. SCHNEIDER: Thank you, Your Honor. Other than that, nothing further from the defense.

THE COURT: All right. Very well. That will conclude this matter, and the clerk may adjourn court.

COURTROOM DEPUTY: Please rise. This court is adjourned.

(The proceedings were adjourned at 11:02 a.m.)

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WITNESS INDEX

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C E R T I F I C A T E

I, Allison A. Kimmel, do hereby certify that the foregoing is a true and correct transcript of the proceedings before the Honorable James L. Graham, Senior Judge, in the United States District Court, Southern District of Ohio, Eastern Division, on the date indicated, reported by me in shorthand and transcribed by me or under my supervision.

s/Allison A. Kimmel
Allison A. Kimmel, RDR, CRR, CRC
Official Federal Court Reporter
April 9, 2018